



Parsons, J. A. (2021). Early analysis of deemed consent: why Moorlock's critique is mistaken. *Journal of Law and the Biosciences*, 8(2), [Isab025]. <https://doi.org/10.1093/jlb/Isab025>

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Early analysis of deemed consent: why Moorlock's critique is mistaken

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I. INTRODUCTION

In a recent paper, I compared the approaches to deemed consent in England and Scotland.¹ Moorlock has since responded, suggesting that I am incorrect on the points made.² Here, I demonstrate that Moorlock's take is problematic because it is based on misinterpretations of my arguments.

II. FAMILY VETO

Moorlock contends that I did not compare like with like when exploring the family's role in the new deemed consent systems. No clinical guidance was published in Scotland at the time, so I was comparing legislation *and* guidance in England with *just* legislation in Scotland. Moorlock is correct that there are issues in doing so, but such is the nature of analyzing evolving policies. I did acknowledge this, noting the apparent difference might disappear if guidance were published in Scotland. Incidentally, such guidance has since been published, and it does align with the English guidance on the matter of deeming consent in the absence of consultation with someone in a qualifying relationship.³ This is not indicative of a flaw in my earlier analysis but, rather, it having (rather swiftly) become outdated. Incidentally, the Welsh guidance does permit donation to proceed when the family is uncontactable—albeit with requirements that make this unlikely.⁴

- 1 Jordan A. Parsons, *Deemed consent for organ donation: a comparison of the English and Scottish approaches*, 8(1) J. LAW BIOSCI., lsab003 (2021). <https://doi.org/10.1093/jlb/lsab003>.
- 2 Greg Moorlock, *Premature presumptions about presumed consent: why Parsons' comparison is mistaken*, J. LAW BIOSCI., lsab024 (2021).
- 3 Scottish Government, *Guidance on Deceased Organ and Tissue Donation in Scotland: Authorisation Requirements for Donation and Pre-death Procedures*, at para 107.
- 4 Human Tissue Authority, *Code of Practice on the Human Transplantation (Wales) Act 2013*, at paras 16 and 17.

Additionally, Moorlock suggests I was wrong to claim the Scottish model (as it would have been, absent the recent guidance) helps overcome the family veto by permitting donation to proceed where the family is uncontactable. However, Moorlock appears to be commenting on a claim I did not make. Discussing how the Scottish model could be considered a slightly harder opt out, I specifically used the language of the role of the family. I do not refer to the English guidance that donation should not proceed where the family is uncontactable as a family veto. Indeed, I comment on how '[o]ne might conceive of a person in a qualifying relationship as having more power in their absence than in their presence'⁵ because the veto—meaning an active objection when contactable—requires them to evidence their claim that the deceased would object. The same comment on the role of the family is now applicable to the Scottish system.

III. DUTY ON MINISTERS

Second, Moorlock takes issue with my argument that a lack of a duty on ministers to ensure awareness of the new system in England is less desirable than the presence of such a duty in Scotland (and Wales). He appears to have read my argument as far more empirical than it is. I have not claimed that Scotland's duty on ministers will result in greater public awareness. Rather, I suggested that the Scottish approach is preferable in terms of its principled recognition of autonomy.

Moorlock is correct that there is a focus on public awareness in England, but my contention is that the decision not to introduce a legal duty on ministers suggests a lesser focus than elsewhere in Great Britain. It cannot be claimed that it was simply not thought of as a possible feature of the legislation because Wales had, years previously, included such a duty. In England, then, there was an active decision to depart from the Welsh example.

Moorlock is certainly right that 'formality' is open to interpretation, and some may think that my phrasing was too strong. Nonetheless, it remains that the choice not to include a duty on ministers after Wales had previously done so represents a less formal recognition. Where something as significant as an alteration to the nature of consent is introduced, I consider it important that there be as formal as possible a recognition of the importance of public awareness—in this case, a duty on ministers.

IV. COVID-19 RESPONSE

Finally, Moorlock argues that, contrary to my position, England did respond to the challenge of COVID-19. He cites NHS Blood and Transplant (NHSBT) meeting minutes in which the challenges are acknowledged such that the Department of Health and Social Care considers it 'unlikely that transplants will proceed under deemed consent'.⁶ However, Moorlock places significant weight on this informal statement of what the Department anticipates—that it is 'unlikely' to happen, not that it will not be permitted to happen. It remains that there has been no pandemic-related legal obstacle

5 Parsons, *supra* note 1, at 8.

6 NHS Blood and Transplant, *NHSBT Board Meeting May 2020*, <https://nhsbtdbe.blob.core.windows.net/umbraco-assets-corp/18858/11-organ-donation-consent-legislation-and-public-awareness-campaign-update-may-2020.pdf>, at para 6.2.

to the operation of deemed consent in England since its implementation. If genuinely concerned about its timing, England would have delayed the change like Scotland. As such, based on the meeting minutes, it is inaccurate to say that England changed its approach to implementation in response to the COVID-19 pandemic.

Further, concern with the system being introduced during the pandemic is not only about how it plays out in clinical practice but also public perception.⁷ The NHSBT minutes acknowledge a worry that it 'might attract negative media attention that may cause long-term reputational damage'.⁸ Given the recognition of this risk and the expectation that deemed consent would not operate during the pandemic, it is puzzling why implementation would not be delayed. Moorlock has not clearly demonstrated that England changed course in any significant way in response to the pandemic context.

V. CONCLUSION

Moorlock appears to have misinterpreted several of my earlier points. I previously acknowledged that Scotland would likely produce clinical guidance, I did not frame the role of the family as a veto, and I did not claim that public awareness could not be achieved without a legal duty on ministers. Further, I do not consider it a response to the pandemic that the Department of Health and Social Care merely acknowledged issues with the timing of deemed consent's implementation. Moorlock might consider my analysis to have been premature, but, given the tentative phrasing of much of my discussion, I think it entirely appropriate.

7 Jordan A. Parsons and Greg Moorlock, *A global pandemic is not a good time to introduce 'opt-out' for organ donation*, 20 MED. LAW INT. 155 (2020).

8 NHS Blood and Transplant, *supra* note 6, at para 8.